

No. 20,868

IN THE

United States Court of Appeals for the Ninth Circuit

EVANS PRODUCTS COMPANY,
Defendant-Appellant,

vs.

PRECO INCORPORATED,
Plaintiff-Appellee.

APPELLANT'S REPLY BRIEF

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I. ERRORS IN PRECO'S BRIEF

Before dealing with both the arguments presented in and the arguments omitted from the brief of Appellee Preco, it may be well to correct the following incorrect representations appearing in Preco's brief:

1. The trial court did not require both parties to submit proposed findings of fact and conclusions of law, as stated on page 3 of Preco's brief, nor did Evans file any proposed findings and conclusions as there stated. After delivering an oral opinion at the end of the trial the District

Court directed that Preco submit findings and conclusions in conformity with the opinion. While the trial court indicated that Evans could propose findings on any issues *not covered in the Court's oral opinion* and could object to the proposed findings on the issues which had been covered (TR. 1388) there was no requirement that Evans file proposed findings. While Evans did present to the trial court objections to the Findings of Fact and Conclusions of Law proposed by Preco, it did not submit any proposed findings or conclusions to the trial court.

2. Three numbered and allegedly important differences between the patent in suit and the accused devices are set out at pages 27 and 28 of Preco's brief. In the difference numbered (2) it is stated that the rails are mounted on the ceiling rather than the wall. The statements at pages 28 and 59 of Preco's brief that these important differences in Preco's BD-6 model load divider were demonstrated and pointed out to the trial court is clearly erroneous since the rail in the Model BD-6 is admittedly mounted on the wall. See page 32 of Preco's brief.

3. Preco states at page 44 of its brief that Evans did not contend before the trial court that the Potter Patent No. 226,702 relied upon by Preco and covering a farm gate, is from a non-analogous art. This is absolutely false. Evans did so contend both during the taking of the testimony (TR. 1092), and during the final argument (TR. 1379).

II. RE RULE 52(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE

Without specifically citing this rule Preco states, page 9, that factual findings are not to be disturbed unless clearly erroneous and thereafter in its brief seeks to characterize virtually all of the determinations of the trial court which it discusses, as factual findings. The errors of the trial court will be considered in detail herein as they apply to each of the issues discussed, but it may be said at the outset that the so-called Findings of Fact of the trial court which are here in dispute, in most cases are in reality erroneous legal conclusions or are based on errors of law and accordingly, are not entitled to the benefit of Rule 52(a) and are determinations which should properly be made by this Court unfettered by any application of Rule 52(a). In the few instances where the determinations of the trial court here in issue are properly considered to be findings of fact, it will be seen that they are clearly erroneous.

III. INFRINGEMENT

A. The Contention that the "Findings of Fact" on Infringement are Not Shown to be Clearly Erroneous

Preco contends at page 52 of its brief that the "Findings of Fact" dealing with the question of infringement are supported by evidence and that Evans has failed to show that they are "clearly erroneous" as required by Rule 52(a). However, if the so-called "evidence" in support of these findings is examined, it will be found to boil down to testimony of Preco's expert witness, Chestnut, based solely on a gross misconstruction and misapplication of the patent

claims. There is no material dispute as to how the accused bulkhead systems are constructed or how they operate and there is no dispute as to the construction or function of the bulkhead system disclosed in the Wells patent. Moreover, Preco has offered no evidence tending to refute the obvious fact that the elements of the accused construction are substantially the same as and perform the same function and co-act with each other in the same manner as the corresponding elements of the new combination claimed in the patent.

The alleged conflict in the evidence as to the readability of the claims on the accused constructions resides solely in the denial by Mr. Chestnut that the claim language properly describes the accused constructions, which denial he highlighted by writing the word "No" after most of the entries on charts which were attached to the Evans trial brief and, which were thereafter offered in evidence as DX AZ-1, 2 and 3 to illustrate the respective positions of the parties on the question of readability.* However, as pointed out in the Appellant's Brief on this appeal at pages 29-41, these statements by Mr. Chestnut are mere conclusions based on a clearly erroneous assumption or upon a clearly erroneous construction of the patent claims. The District Court in accepting and following these conclusions made errors of law. Moreover, if the conclusions involve any findings or inferences of fact they are clearly erroneous and not supported by the evidence.

The errors fall into two main categories, discussed below:

1. The District Court adopted a gross misapplication of three clauses of Claim 1 to the accused construction. The three clauses in question are those designated (g), (j) and (k) on the chart DX AZ-1. There is a pretension that this involves a finding on a factual issue, but this will not stand

* Copies of these charts appear as part of the Appendix to the main brief for Evans.

the test of close examination. If clause (g), which reads as follows:

“a bar disposed between and supported by said rails, the ends of said bar being slidably mounted on said rails for movement to selected positions with respect to the longitudinal length of said rails”

is applied to the transverse bar numbered 42 on the stipulated charts DX AE-1* and DX AF* showing the accused Model BD-2, *to which it is fully and fairly applicable*, then there would remain no basis for denying that clauses (j) and (k) are also fully applicable to the accused Model BD-2. Thus, clause (j) calls for “a pivotal connection between said member (the bulkhead 40) and the said bar” 42, which is the pivotal connection between the supporting yoke 56 and the pin 52 best shown in the chart DX AF. Similarly, clause (k) calls for “means slidably mounting the said pivotal connection on the bar . . .”, which is the roller bracket 54 with its supporting rollers 62 which move along the length of the bar 42.

The Preco expert Chestnut supported his denial that these three clauses are applicable to the accused construction BD-2 by taking the position that the term “bar” of clause (g) had to be applied to the timing shaft rather than the bar 42. From this false premise he then asserted that clause (j) was not applicable because in the accused constructions the “pivotal connection” was not between the bulkhead and the timing shaft. But it should be noted he did not deny that in the accused constructions there was “a pivotal connection between said members (the bulkhead) and said bar” 42 which functioned in exactly the same manner as the pivotal connection of the patent. That there is such a connection between the bulkhead and the bar 42 is obvious and cannot be denied. Consequently, there is no

* Copies of these charts appear as part of the Appendix to the main brief for Evans.

support for his denial as to clause (j) if the "bar" of clause (g) is the transverse bar.

Chestnut also asserted that clause (k) was not applicable because in the accused constructions there was no "means slidably mounting the said pivotal connection on the bar . . .", considering the "bar" to be the timing shaft. But again, note he did not deny that the accused constructions included "means slidably mounting the said pivotal connection on the bar" 42. Here also, that there is such a means slidably mounting the pivotal connection on the bar 42 is obvious and cannot be denied. Thus, there is no support for his denial as to clause (k) if the "bar" of clause (g) is the transverse bar 42.

That clause (g) is properly applicable to the bar 42 of the accused constructions is pointed out in Evans' main brief on this appeal at pages 29 to 31. The utter fallacy of Chestnut's application of the term "bar" of clause (g) to the timing shaft of the accused constructions is evident from the fact that Chestnut himself testified that the timing shaft of the accused BD-2 model did not have the characteristics attributed to the "bar" in clause (g) itself (TR. 1103-4). In fact, this is the very basis on which he applied the word "No" to the entries in the horizontal line opposite clause (g) on the chart DX AZ-1, and opposite the corresponding clauses (e) of Claims 2 and 3 on charts DX AZ-2 and 3. Thus, we have a house of cards built by Chestnut on a foundation which his own testimony destroys. Evans' position here with respect to clauses (j) and (k) is clearly borne out by the fact that in the case of the accused Model BC-4 where Preco admits that the transverse bar 42 satisfies clause (g) it similarly admits that clauses (j) and (k) are satisfied. See the absence of "Noes" on DX AZ-1 in the model BC-4 column opposite the clauses (g), (j) and (k).

If the District Court's wholesale adoption of Chestnut's theory of claim application can be considered a finding of fact, it is clearly erroneous. It is noted that Preco did not make any attempt in its brief to present any justification for or any defense of this gross misapplication of the language of the claims of the Wells patent in suit which was referred to in Appellant Evans' main brief at pages 3, 20 and 23, and which was set out in detail at pages 29 to 31, 37 and 39. Preco offered no excuse for this calculated effort to make the claim not read on the accused devices by intentionally selecting as the member upon which the claim language "transverse bar" should read, a member through which the transverse bar in the accused devices is supported on the rails.

In assessing the positions of the two parties here with respect to scope of the claims, it is worthy of note that Evans adopted and persisted in its construction even though under the agreement covering its purchase of the Wells patent this required it to pay royalties under the patent in suit on its DF-B bulkhead equipment and it has, accordingly, paid over \$100,000 of such royalties (TR. 986-7). On the other hand, Preco adopted its strained construction as a device to escape liability for infringement.

2. The District Court has read into the patent claims limitations which are not expressed therein and which are not required to distinguish over the prior art or to limit the claim to equivalents of the claimed combination. This is an error of law. While it is occasionally proper to limit a claim by reading into it an unexpressed limitation in order to save its validity, that practice is not warranted when, as here, the unexpressed limitation in question does not distinguish over the prior art or impart patentability. Not even Preco suggest that the limitations it urges are required for this purpose.

It may also be proper to so limit a claim that it will encompass only equivalents of the structure disclosed in the patent, but this negative application of the doctrine of equivalents has no application here because no evidence was offered tending to show that the claimed elements of the patented combination were substantially different or functioned in any different manner or produced any different result than the corresponding elements of the accused construction as set forth in the typed material on the claim charts DX AZ-1, 2 and 3.

The claim language which the court below was led to restrict beyond the letter and spirit of the language itself is found in clauses (d), (e), (f), (h) and (l) of Claim 1. The obvious errors of law and fact involved in the District Court's ruling that these clauses must be construed to distinguish over the accused constructions are discussed in the main brief for Evans (Appellant's Brief) at pages 31 to 37. Similar errors as to Claims 2 and 3 are discussed at pages 37-41, and the authorities which support the conclusion that there are errors of law are set forth at pages 41-42.

Even the authorities cited by Preco recognize that in cases such as the present one the question of infringement resolves itself into one of law. In *Kwikset Locks Inc. v. Hillgren*, 210 F. 2d 483, this Court stated, pp. 488-9,

“While it is true that a district court's finding of infringement is generally considered to be a finding of fact that may not be set aside unless clearly erroneous, ‘it is (also) well settled that where, as here, there is no dispute as to the evidentiary facts, and the record and exhibits enable us to clearly comprehend the nature both of the process patented and the alleged infringement process, the question of infringement resolves itself into one of law, depending upon a comparison between the two pro-

cesses and the correct application thereto of the rule of equivalency. The testimony in this case was largely expository and descriptive of the elements and operation of the two processes and was not disputed.' "

The Court cited its prior decision in *Kemart Corp. v. Printing Arts Research Lab, Inc.*, 201 F. 2d 624, also cited in Preco's brief, where this Court used substantially the same above quoted language at pp. 627-8.

Also, in *Stuart Oxygen Co. v. Josephian*, 162 F. 2d 857, in a case where the testimony involved the proper meaning of claim language, this Court rejected the contention that Rule 52(a) was applicable to the lower court's determination on the issue of infringement and stated, page 859,

"The terms of the patent and the respective devices of the parties are also before us for our inspection. The facts are clear and undisputed and the question of infringement in this case can be determined by a comparison of structures and is a question of law."

The mere fact that Chestnut testified that the claims do not read upon the accused devices does not make the acceptance of that conclusion a finding of fact. In *McRoskey v. Braun Mattress Co.*, 107 F. 2d 143, also cited by Preco, this Court affirmed the action of the lower court, in a jury case, in directing a verdict of no infringement in spite of expert testimony that the claim read on the accused device.

B. The Alleged Admissions of Evans Are Irrelevant to the Question of Infringement

In an apparent attempt to make it appear that the lower court's holding of no infringement is supported by evidence, Preco in its brief repeatedly refers to so-called admissions by Evans that the accused structures differ in a number of respects from the embodiment of the Wells invention which is illustrated and described in the patent in suit. The District Court also seemed to attach great significance to these so-called admissions. There is no dispute over the facts of this matter. These structures *do* differ in a number of respects and neither Evans nor any of its witnesses has ever pretended otherwise. The Evans commercial construction, since it is essentially the same as several of the accused constructions, similarly differs from the structure illustrated in the patent. *However, these differences have no bearing whatever upon the question of infringement.*

In the first place, as has been shown, none of these differences impairs the readability of the claim language on the accused constructions. Each phrase of each claim is fully and fairly applicable to every one of the accused constructions except that model BC-3 employs a mere reversal of parts from that recited in clauses (e) and (i) of claims 2 and 3 all as pointed out in detail in the claim charts DX AZ-1, 2 and 3. The claim language is not only fully applicable but it means the same thing when read upon the accused constructions as it does when read upon the illustrative embodiment in the patent.

Secondly, *there is no evidence* which indicates that the basic elements of the accused constructions function differently or co-act with each other in any different way

than the corresponding elements of the patent. The differences, in short, are of two kinds. First, those obvious modifications required to adapt the invention to a freight car—an adaptation expressly contemplated by the patent itself; and second, mere additions to the patented combination which provide added functions without altering the operation or function of the basic elements set forth in the patent claims.

The differences which any mechanic would recognize were necessary to adapt the bulkhead system to railroad use cannot support a finding of non-infringement when they do not involve any departure from the basic principles of construction and operation taught by Wells. In this instance, the inventors chose to illustrate an embodiment of their invention suitable for use in an open top cattle truck. Under the patent law they were under no obligation to illustrate embodiments suitable for use in other environments where no unobvious alterations were required, but they did expressly state that the invention could be used in freight cars. It is obvious that for that purpose a larger and stronger piece of equipment would be required.

The idea of using bulkheads in freight cars was not a new one at the date of the Wells invention. Many bulkhead designs had been tried and many more patented. The features of these prior constructions were available for use in adapting the Wells invention to freight car use. Thus, for example, it was recognized that the bulkhead had to be secured as by sliding bolts to the side walls or other fixed parts of the car to hold the bulkhead in place and sustain the heavy shock loads. In prior art patents, such bolts are disclosed, some operating horizontally and some operating vertically. The essential structure, function and result is the same, whether the bolts move horizontally or vertically. The claims of the patent in suit do not

specify in what direction the lock bolts move and, therefore, infringement cannot be avoided by providing vertically moving bolts.

Considerable stress is laid by Preco on the fact that its vertically moving lock bolts at the lower edge of the bulkhead have shoulders which rest on the lower locking strips and sustain part of the weight of the bulkhead, thereby relieving the supporting transverse bar 42 of shock loads due to vertical vibration. This function of protecting the suspension from shock loads due to vertical vibration is also performed by the horizontal bolts of the patent (TR. 558-9, 811-12). Surely, one cannot escape infringement by claiming that the assumed construction performs a function performed by the patented construction. In any event, this feature, including the sustaining of part of the weight on the vertical pins, is a refinement which is not called for by the patent claims and its presence in the accused devices in no way negatives infringement.

Finally, the statements regarding these differences to which Preco points in the Erickson et al. application for patent relating to the Evans commercial DF-B bulkhead were not statements construing the scope of the Wells patent in suit. Accordingly, the case of *Canadian Ingersoll-Rand Co. v. Peterson Products*, 350 F. 2d 18, relied upon by Preco, clearly does not support the relevance of the statements from the Erickson et al. application for in that case the statements in question were made in construing the scope of the patent in suit. The statements to which Preco points in the present case were made in arguing the patentability of certain improvements not involved in the present case and in no way related to the scope of the Wells patent in suit. The proper case law regarding the irrelevancy of such statements is pointed out at page 45 of Appellant's

main brief and is not contra to this Court's decision in the *Canadian Ingersoll-Rand* case, *supra*, as stated by Preco at page 41 of its brief.

C. The Three Important Differences Relied Upon by Preco

None of these allegedly important differences (Preco brief pages 27-30 and 59-60) presents any factual dispute, the sole dispute being as to the legal effect of these differences and the proper construction of the claims of the patent in suit. As pointed out in Evans' main brief, pages 41 to 44, when the claims in suit are correctly construed, these differences in no way support the holding of no infringement. The principles there stated are applicable to each of these claimed improvements, whether it be the use of the timing shaft to provide an aligning action in the accused devices, or the carrying of the rails and detents on the side walls through the ceiling structure (to permit its assembly therewith as a unit) as in most of the accused models as opposed to the Model BD-6 where the rails and detents are carried directly on the side walls, or the use of the vertically moving lock bolts discussed in the previous section. In all of the accused devices the basic combination of the patent in suit is employed and the incorporation of these differences in no way avoids infringement.

D. The Contention of File Wrapper Estoppel

Finding No. 41 is clearly a conclusion of law based on undisputed facts. Preco states that it is factual insofar as what occurred before the Patent Office, but there is no dispute of fact regarding what occurred before the Patent Office. The issue of file wrapper estoppel presents a ques-

tion of claim construction as stated by the Supreme Court in *Exhibit Supply Co. v. Ace Patents Corp.*, 315 U.S. 126, 137 and is thus clearly an issue of law for the Court.

Appellant's position regarding the language "slidably mounted on said rails" is fully set out in its main brief at pages 46 and 47.

Preco seeks at page 64 to suggest that there is a file wrapper estoppel limiting Claim 1 to an arrangement in which the rails are C-shaped. There is nothing in the file wrapper in any way warranting this contention. The construction of the claim language "said rails being constructed for guiding such movement" is a question of law for the Court. This language appears in clause (h) of Claim 1 which is dealt with at pages 34 to 37 of Appellant's main brief from which it will be seen that this language properly reads on the accused devices.

E. The Contention That the Wells Claims Should be Limited to the Device Disclosed

This contention is contrary to the decisions of the Supreme Court and of this Court referred to at pages 36 and 37 of Evans' main brief when, as in the present case, such limitation is not required either by the claim language or to avoid the prior art. In the only case relied upon by Preco in support of this contention, namely, *McRoskey v. Braun Mattress Co.*, 197 F. 2d 143, this Court had before it a fact situation in which the only distinguishing feature was the conical shaped mattress depressing members which designate the places where the mattress was to be tufted, as stated at page 145, and thus the prior art there required the limited construction adopted by the Court.

F. The Contention that Preco Followed the Prior Art

An examination of this contention shows that Preco's following of the prior art is with reference to its so-called improvements incorporated in its embodiments of the Wells et al. invention which it builds for use in railroad cars. It is not stated that it is following any prior art as to the basic combination of the Wells patent in suit. On page 61 of Preco's brief where this contention is presented, it is argued that Preco uses the timing shaft of Moriarty and vertically moving lock bolts as shown in several prior art patents. While these differences may render the Preco accused devices more suitable for railroad car use than the truck embodiment illustrated in Wells, they in no way show that Preco was following the prior art insofar as the basic combination of the Wells patent in suit is concerned. The statement that Preco is using the means for supporting the partition from the crossbar shown in Deady No. 1,622,574, provides no proper support for this contention that Preco followed the prior art. Deady does not show any partition and in fact, relates to the travelling beam crane art which as pointed out in Evans' main brief, page 61, is a non-analogous art.

None of the prior art shows or suggests the basic combination of the patent in suit, namely, a bulkhead mounted on a transverse bar for pivotal movement relative thereto between a position in which the bulkhead extends transversely of the car and a position in which it extends longitudinally of the car and in which the bulkhead may be moved transversely of the car by moving it along the transverse bar and in which the bulkhead may be moved longitudinally of the car by moving the transverse bar along longitudinally extending rails upon which it is supported, together with

means for locking the bulkhead in position transversely of the car. This basic combination in which the elements function and coact to provide the universal adjustability pointed out at pages 8, 60, 65 and 66 of Evans main brief, is taught only in the patent in suit and it is the patent in suit, not any prior art, which Preco is following in employing this basic combination.

IV. VALIDITY

This issue is fully treated in Evans' main brief at pages 51 to 67. Attention is directed to the fact that Preco in its brief does not deny that there was a long-felt need for an improved bulkhead for bracing freight in freight cars, nor does it deny that when Evans brought out its DF-B bulkhead equipment it met with an immediate and remarkable commercial success. Neither does it deny that Preco abandoned its own prior designs dating back as early as 1940 and adopted the bulkhead constructions accused herein. Preco says, page 25, that it ceased manufacture of its early designs because of World War II but admits that it did not restart bulkhead manufacture until thirteen years after the war was over and after it claims, page 19, that Evans had made its first DF-B (Wells type) bulkhead. Its only answer to the commercial success so clearly shown in this case is that by intentionally applying the claim language to the wrong elements, resulting in misapplication and misconstruction of the claims, it has shown that the claims in suit do not cover the commercially successful bulkheads. This ruse having been exposed, the commercial success stands established. As pointed out at pages 52-53 of Evans' main brief, the entire industry has adopted the basic combination of the patent in suit. The following statement of this Court in *Moist Cold Refrigerator Co. v. Lou Johnson Co.*, 249 F. 2d 246, 253-4, a case cited by Preco, is believed to be applicable here,

"Once it has been established that a mechanical problem has been recognized as a problem within an industry for a long time, and that men of ordinary skill in the art have failed to meet it, there is at least some ground for the conclusion it was beyond their capacity, and 'such a circumstance has not infrequently been held sufficient to carry a discovery across the inventive line.' (citing cases).

"The significance of proof, both of lack of prior discovery, and of public acceptance thereafter, is that this is some evidence that the inventor has done something in his combination which, even though obvious now, was not then obvious to those skilled in the art."

Attention is also directed to the fact that Preco in its brief does not deny the fact, pointed out in Evans' brief at page 58, that the District Court made no finding and entered no conclusion of law that the patent in suit does not meet the statutory requirement of novelty.

A. The Contention That the "Findings of Invalidity" Are Not Clearly Erroneous

An examination of the so-called "findings of invalidity" in view of the Supreme Court decision in *Graham v. John Deere Company*, 383 U.S. 1, 15 L. Ed. 2d 545 and the pertinent decisions of this Court reveals as pointed out in Evans' main brief, pages 58 to 60, that they involve only legal conclusions based on undisputed facts. This is even apparent from Preco's analysis appearing at pages 13 and 14 of its brief. With respect to the "first factual determination" referred to in the Graham case, Preco makes no claim that there is any factual dispute as to the scope and content of prior art. Similarly, with respect to the second matter, Preco makes no claim that there is any factual

dispute as to the differences between the claims of the patent in suit and the prior art. The third and last factual consideration stated in Graham is the level of ordinary skill in the art to which the invention pertains. Preco contends, page 14, that this determination is to be made from all of the prior art, which in this case is not in dispute. Moreover, the District Court made no determination of the level of ordinary skill in the art to which the invention pertains, and therefore, it is only its ultimate legal conclusion of obviousness in view of the undisputed facts, which is disputed here. Rule 52(a), of course, does not apply to this legal conclusion, as is conceded by Preco.

This is also recognized by the decisions of this Court cited by Preco. See *Bergman v. Aluminum Lock Shingle Corp. of America*, 251 F. 2d 801, 803 where this Court quoted from the Supreme Court decision in the A & P case the statement that the question of validity of a patent is a question of law. It also quoted from *Mahn v. Harwood*, 112 U.S. 354 the statement that whether the thing patented amounts to a patentable invention is a question of law. Also, in *Continental Connector Corp. v. Houston Fearless Corp.*, 350 F. 2d 183, much cited by Preco, this Court stated the same principle with reference to a combination patent, stating that the result there reached is not based on any belief that this Court is bound by the conclusion of the trier of fact as to validity, adding that validity of a combination patent is determined as a matter of law.

Preco's suggestion at page 14 of its brief, that there are no differences between what is claimed in the patent in suit and the prior art, misrepresents the matter in two respects. Firstly, the suggestion that all of the elements of Wells are generally old does not support the representation that there are no differences from the prior art where, as here, the patent in suit is for a new combination which

meets the statutory test of novelty, which is not suggested in any of the prior art, which accomplishes a new and useful result, which filled a long-felt need, and which has had a remarkable commercial success, all of which indicates the unobviousness of the combination of the patent in suit.

Secondly, as pointed out in Evans' main brief, pages 60-62, the travelling beam crane art upon which Preco relies so heavily is a non-analogous art, but even if properly entitled to consideration, contains no disclosure or suggestion of a pivotal connection between the trolley and the hoist supported thereby and there is no suggestion in the bulkhead art prior to the patent in suit, of a bulkhead connected by a pivotal connection to a trolley moveable along a transverse beam mounted for movement longitudinally of the car.

B. The Contention that the Structure of the Wells Patent in Suit Has Never Been Produced and Is Not Suitable for Use In a Freight Car

This contention at pages 16-18 and 56-57 of Preco's brief appears primarily to relate to the specific construction illustrated in the Wells patent and insofar as that is the case, this contention is clearly irrelevant. The construction illustrated in the Wells patent is admittedly designed for use in a cattle truck and one skilled in this art would naturally use a specifically different construction in a railroad boxcar which is over nine feet wide, over ten feet tall, and where the freight bracing forces are many times those encountered in cattle trucks both because the railroad cars carry many times the freight load of the pickup truck and because of the severe shock loads encountered by the railroad cars. The contention, even if true, that the specific structure illustrated in the Wells patent has never

been produced in no way weakens the Wells patent in view of the fact that other embodiments of the Wells invention have been produced in large numbers and met with commercial success.

Wells et al. clearly contemplated that their invention was usable in railroad cars and so stated in the opening paragraph of their patent. The fact that the inventors chose to illustrate in their patent an embodiment in a truck for transporting cattle in no way weakens the right to enforce the patent against one using the invention in a railroad car in accordance with the patentees' suggestion that it could be so used.

Similarly, the facts that the embodiments of the Wells invention produced by Evans were for use in railroad cars, that Evans never constructed the specific structure illustrated in the Wells patent, and that Evans had no knowledge regarding the first successful testing and use of the Wells invention, have no bearing on the validity of the Wells et al. patent.

CONCLUSION

Appellant Evans respectfully submits that the judgment should be reversed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

.....

Robert L. Boynton,
Attorney.

PROOF OF SERVICE

Robert L. Boynton, counsel for Appellant, Evans Products Company, in the above entitled matter hereby certifies that three (3) copies of the foregoing Brief were placed in the United States mail, air mail, special delivery with postage fully prepaid addressed to Whann & McManigal, 315 West Ninth Street, Los Angeles, California, 90015, on this 21st day of December, 1966.

Robert L. Boynton.